Supreme Court, U.S.
FILED
DEC 8 - 2008
OFFICE OF THE CLERK

114

(8)

No. 08-212

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

CARTER G. PHILLIPS*
EUGENE R. ELROD
JAMES F. BENDERNAGEL, JR.
RICHARD D. KLINGLER
SCOTT A.C. MEISLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner Exxon Mobil Corporation

December 8, 2008 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to this Court's Rule 15.8, petitioner Exxon Mobil Corporation submits this supplemental brief to bring to the Court's attention an order of the Federal Energy Regulatory Commission ("FERC") that resolves in petitioner's favor two issues raised by respondents in this proceeding.

On the same day petitioner filed its reply brief, FERC issued an order addressing, as does the decision of which review is sought, a valuation dispute arising from the operation of the Trans Alaska Pipeline System (TAPS) Quality Bank. See *Order Accepting Compliance Filing*, Docket No. OR06-10-003, 125 FERC ¶ 61,254 (Dec. 2, 2008) ("*Compliance Order*") (attached as an Appendix to this brief). The *Compliance Order* addressed and rejected a protest by Flint Hills Resources Alaska LLC against the TAPS carriers' filing of a particular retroactive quality bank (rate) adjustment. Flint Hills challenged the extent of the retroactive application as inconsistent with § 4412(b)(2) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144, 1778-79 (2005), which provides:

> In a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

In the *Compliance Order*, FERC rejected Flint Hills' argument that the relevant "first order" under § 4412(b)(2) is not the first order in the proceeding

imposing a quality bank adjustment, but rather a much later order that definitively fixes for the first time the final numerical value of the adjustment. See *Compliance Order*, 125 FERC ¶ 61,254, at ¶¶ 3, 12, 16. Adhering to the plain meaning of the statutory text, FERC held that the earlier order in the proceeding was the relevant one for purposes of calculating § 4412(b)(2)'s 15-month limitation on retroactivity because "it was the first order issued by the Commission in this proceeding and it imposed a quality bank adjustment . . . subject to refund." *Id.* ¶ 17. Flint Hills' contrary reading, FERC explained, "stands the language in [§ 4412(b)(2)] on its head" and "improperly would read the word 'first' out of the provision." *Id.* ¶ 19. FERC also contrasted the operation of § 4412(b)(2) as construed in the *Compliance Order* with the application of § 4412(b)(1) to petitioner in the proceeding now subject to the petition before this Court. In that proceeding, "[t]he Commission affirmed the [ALJ's] retroactivity ruling but limited the retroactivity period, and the resulting refunds, to February 1, 2000, in accordance with the Congressional limitation in section 4412(b)(1)." *Id.* ¶ 20 n.11.

The *Compliance Order* is relevant to – and rejects – the arguments of respondents in two important respects. *First*, several respondents had argued that this case is a poor vehicle to review the issues presented because § 4412(b)(2) does not operate in the straightforward manner described in the Petition, but is instead ambiguous. In those respondents' view, applying that provision hypothetically to petitioner *could* result in a retroactivity period *shorter* – and thus less favorable – than the actual result when FERC applied the special rule of § 4412(b)(1) to petitioner. See Br. for Williams Alaska Petroleum Inc. at 14-16; Br. for OXY USA Inc.

and Union Oil Co. at 5-7; Br. for Petro Star Inc. at 28-30. Respondent Petro Star specifically noted that "the meaning of subsection 4412(b)(2) is currently the subject of a separate proceeding currently pending before [the] FERC," and thus contended that "[p]etitioner's equal protection and due process arguments rest on a debatable and unsettled legal premise." Br. for Petro Star Inc. at 30; see Br. for OXY USA Inc. at 6-7 (outlining Flint Hills' argument).

Petitioner previously showed that the plain meaning of § 4412(b)(2) undermines respondents' argument, see Pet. Reply Br. at 10-11, and FERC's *Compliance Order* follows that same reasoning to dispel any doubt in that regard and to eliminate any "unsettled legal premise." Indeed, as the *Compliance Order* confirms, § 4412(b)(2) presents no ambiguity. It clearly establishes a more generous general rule than the case-specific directive in § 4412(b)(1) that required a particular result as applied only to petitioner. As interpreted and applied by FERC in the *Compliance Order*, the rule of § 4412(b)(2), were it applied to petitioner's case, would allow full refunds to Exxon Mobil back to 1993, as the ALJ originally ordered. See Pet. 14-15. Accordingly, this case presents a perfect vehicle for this Court to consider the important issue raised in the petition.

Second, the *Compliance Order* confirms that there is no merit to respondent Petro Star's suggestion that § 4412(b)(1) does not direct the outcome of the adjudicatory proceeding that determined petitioner's relief. Petro Star had argued that § 4412(b)(1) does "*not* 'direct' or 'dictate' a particular result in the FERC proceeding at issue" because the Commission could separately have relied on the equitable arguments presented to it. See Br. of Petro Star Inc. at 12-14. Petitioner showed that § 4412(b)(1) clearly

does direct and produce the result reflected in FERC's order. See Pet. Reply Br. at 2. In the *Compliance Order*, FERC has confirmed that petitioner is correct. That order describes the effect of § 4412(b)(1) in the proceeding determining the relief afforded to petitioner: in contrast to how, "[i]n 2004, the ALJ held that certain valuations should be retroactively changed back to 1993, with concomitant refunds back to that date," FERC later "affirmed the retroactivity ruling but limited the retroactive period, and the resulting refunds, to February 1, 2000, *in accordance with the Congressional limitation in section 4412(b)(1).*" *Compliance Order*, 125 FERC ¶ 61,254, at ¶ 20 n.11 (emphasis added). Once again, the *Compliance Order* confirms that this case presents a particularly good opportunity for this Court to consider the important separation-of-powers and due process issues presented by the petition.

CONCLUSION

For the foregoing reasons and those presented in the petition and petitioner's reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
EUGENE R. ELROD
JAMES F. BENDERNAGEL, JR.
RICHARD D. KLINGLER
SCOTT A.C. MEISLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner Exxon Mobil Corporation

December 8, 2008

* Counsel of Record

APPENDIX

APPENDIX

125 FERC ¶ 61,254

UNITED STATES OF AMERICA

FEDERAL ENERGY
REGULATORY COMMISSION

Before
Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

Docket No. OR06-10-003

BP Pipelines (Alaska) Inc.
ConocoPhillips Transportation Alaska, Inc.
ExxonMobil Pipeline Company
Koch Alaska Pipeline Company
Unocal Pipeline Company

ORDER ACCEPTING COMPLIANCE FILING

(Issued December 2, 2008)

1. This matter involves valuation under the Trans Alaska Pipeline System (TAPS) Quality Bank, which is a system for making monetary adjustments among shippers on TAPS for the differing qualities of Alaska North Slope (ANS) crude petroleum shipped on TAPS.

2. On April 2, 2008, the TAPS Carriers[1] filed the compliance filing to be effective June 1, 2006, as ordered by the Commission's March 20, 2008 Order in Opinion No. 500.[2]

3. Flint Hills Resources Alaska LLC (Flint Hills) protested the proposed effective date of June 1, 2006, as violating section 4412 (b)(2) of the Motor Carrier Safety Reauthorization Act of 2005 (section 4412 (b)(2)).[3] The Commission accepts the compliance filing and rejects Flint Hills' protest.[4]

Background

4. The TAPS Quality Bank is administered by the Quality Bank Administrator (QBA), an independent neutral expert. The tariff provides for the QBA to give notice of any proposed or needed modification to the pricing scheme governing the Quality Bank.

---

[1] The TAPS Carriers consist of BP Pipelines (Alaska) Inc., ConocoPhillips Transportation Alaska, Inc., ExxonMobil Pipeline Company, Koch Alaska Pipeline Company, LLC and Unocal Pipeline Company.

[2] *BP Pipeline (Alaska) Inc.*, 122 FERC ¶ 61,236, Ordering Paragraph B (2008), appeal docketed *Petro Star v. FERC* (D.C. Cir. 08-1192).

[3] Pub. L. No. 109-59, 119 Stat. 1714 (2005) (The Act).

[4] ConocoPhillips Alaska, Inc. filed an answer on April 30, 2008, and Chevron U.S.A. and Union Oil Corp of California jointly filed an answer on May 2, 2008. On May 7, 2008, Flint Hills replied to the answers of Chevron and ConocoPhillips. On May 14, 2008, Petro Star filed an answer to the answers of Chevron and ConocoPhillips. On May 20, 2008, Chevron filed a response to Flint Hills and Petro Star's filing. Pursuant to Commission Rule 213(a)(2), which precludes answers to protests, unless otherwise ordered, the Commission rejects all the subsequent filings in response to Flint Hills' protest.

5. The TAPS Quality Bank is based on a distillation valuation model, which calculates the value of crude oil streams by first determining the suite of end-use products refined from the ANS common stream, and then valuing these products based upon published, publicly available prices. The QBA then allocates those values, proportionally, to each producer's original ANS crude tender. Some Quality Bank cuts can be sold without further processing, while other cuts, including the Heavy Distillate cut, need further processing before they can be sold as a finished petroleum product. Where processing is necessary, the QBA deducts the cost of processing from the market price of the finished product. The processing costs thus reduce the value of that particular cut.

6. In 2005, the Commission, in Opinion No. 481, established the reference price to value the West Coast Heavy Distillate cut as Platts' West Coast spot quote for Los Angeles (LA) Pipeline Low Sulfur (LS) (EPA) Diesel, which contained a sulfur content of 500 parts per million (ppm).[5] An adjustment of 6.4302 cents per gallon (cpg) is deducted from the reference price to account for the cost of processing 5,000 ppm sulfur ANS crude to the 500 ppm sulfur content of the proxy. On July 28, 2006, the TAPS Carriers filed a notice with the Commission that included the QBA's notice to change the proxy price used to value the West Coast Heavy Distillate cut, effective June 1, 2006. The QBA filed the notice because Platts changed the LS diesel reference price to an ultra low

---

[5] *Trans Alaska Pipeline System*, 113 FERC ¶ 61,062 (2005) PP 50-78 (Opinion No. 481), *order on reh'g*, 114 FERC ¶ 61,323 (2006) (Opinion No. 481-A), *order on reh'g*, 115 FERC ¶ 61,287 (2006) (Opinion No. 481-B) (collectively, Opinion No. 481), *aff'd sub nom. Petro Star Inc. v. FERC*, No. 06-1136, 2008 U.S. App. LEXIS 5328 (D.C. Cir., Mar. 6, 2008).

sulfur diesel price with a sulfur content of only 8 ppm.

7. The QBA notice stated that because more expensive processing is required to meet the lower 8 ppm sulfur specification of this product he recommended that the new replacement price for the West Coast Heavy Distillate cut should be the LA Pipeline Ultra Low Sulfur (ULS) (EPA) Diesel minus a proposed processing cost adjustment of 10.4549 cpg.

8. While all the parties agreed to the proposed new reference proxy, some objected to the proposed processing cost adjustment to the proxy's price. Accordingly, the Commission issued an order on September 26, 2006, which accepted the QBA's recommendation both of the new proxy and the proposed processing cost adjustment of 10.5459 cpg "effective June 1, 2006, subject to refund," and established a hearing to determine the amount of the processing cost adjustment.[6] The order stated the value of the cut "will be subject to refund when the Commission issues the final order."

9. On September 7, 2007, after hearing, the Administrative Law Judge (ALJ) issued an Initial Decision (ID).[7] The ID determined how the QBA should calculate the processing cost and left it to him to calculate the amount of that adjustment. This was the same procedure followed in prior Quality Bank proceedings. The Commission affirmed the rulings in the ID in Opinion No. 500, issued March 20, 2008, and directed the TAPS Carriers "to make a

---

[6] *BP Pipeline (Alaska) Inc.*, 116 FERC ¶ 61,291 (2006) (September 26 Order).

[7] *BP Pipeline (Alaska) Inc.*, 120 FERC ¶ 63,018 (2007).

compliance filing establishing the processing cost adjustment for the West Coast Heavy Distillate cut."

10. The compliance filing established an 8.1340 cpg processing cost adjustment as of June 1, 2006, the effective date for the adjustment under the Commission's September 26 Order, a little more than 2 cents less than the QBA's proposed amount of 10.4549 cpg. The September 26 Order also provided that the amount of the cost adjustment would be revised annually each February using the Nelson Farrar Refinery Operating Cost indices. Accordingly, the 8.1340 cpg processing cost adjustment as of June 2006 was revised to 9.1719 cpg effective February 2007, and to 9.3421 cpg effective February 2008. The compliance filing stated that after the Commission acted on the compliance filing revised invoices would be issued for each month starting June 2006, since the QBA's originally proposed 10.4549 cpg processing cost adjustment was accepted subject to refund and has remained effective since June 2006.

Flint Hills' Protest

11. Flint Hills contends the proposed June 1, 2006, effective date is a retroactive TAPS Quality Bank adjustment that exceeds the permissible 15-month period for retroactive changes to quality bank adjustments permitted by section 4412 (b)(2). That section provides that:

> [i]n a proceeding commenced after the date of enactment of this Act, the Commission may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the Federal Energy Regulatory Commission imposing quality bank adjustments in the proceeding.

12. Flint Hills asserts that the instant proceeding falls under section 4412 (b)(2) since it commenced after the enactment of the Act. Flint Hills argues that the issue here is when is the first order imposing quality bank adjustments in this proceeding from which the 15-month period is calculated. Flint Hills contends this only occurs when the processing cost adjustment is fixed in numerical form. Flint Hills rejects Opinion No. 500 as the date from when the 15-month period is calculated because Flint Hills asserts that Opinion No. 500 only determined how the adjustment should be calculated, and did not "impose any specific quantified adjustment."[8] Flint Hills also rejects the September 26 Order as the first order imposing adjustments because it was "an interim adjustment ... subject to refund depending on the outcome of the hearing."[9] Accordingly, Flint Hills asserts that the "first order" imposing such adjustments, within the meaning of section 4412 (b)(2), will not occur until there is Commission approval of the compliance filing which establishes the applicable processing cost adjustment to the proxy price for the Heavy Distillate cut. Consequently, Flint Hills argues the 15-month period under section 4412 (b)(2) will not be calculable until the date of the Commission order approving the compliance filing, as that would be "the earliest date of the first order" imposing such adjustment in this proceeding.

13. Flint Hills concludes that the effective date for the compliance filing cannot be earlier than 15 months prior to the date the Commission accepts the compliance filing. Flint Hills states, for example,

---

[8] Flint Hills' Protest at 3.

[9] Flint Hills' May 7, 2008 Reply at 3.

that if the Commission accepts the compliance filing by an order issued May 1, 2008, the effective date of that order cannot precede February, 1, 2007. Thus, Flint Hills argues, accepting the instant compliance filing effective June 1, 2006, would be error, and the Commission should issue an order accepting the compliance filing effective no earlier than 15 months preceding the date of that order.

Discussion

14. The Commission concludes that the September 26 Order is the first order referred to in section 4412 (b)(2) which imposed a quality bank adjustment in this proceeding. Accordingly, the C mmission finds no merit in the protest, and accepts the compliance filing because June 1, 2006, is within the permissible 15-month period under section 4412 (b)(2).

15. The Commission established this proceeding in September 2006 for the purpose of determining the amount of the processing cost adjustment to the value of the new proxy, which proxy the Commission accepted in the September 26 Order. That order accepted the new proxy and the proposed processing cost adjustment to that proxy's value, effective June 1, 2006, "subject to refund," namely subject to the outcome of this proceeding. However, that processing cost adjustment was operative, and was an adjustment imposed on Quality Bank participants.

16. We find no merit in Flint Hills' argument that the term "imposing" in section 4412(b)(2) refers to the Commission's order that "approves the final quantification of a new adjustment."[10]

17. The Commission finds that the September 26 Order fits the statutory definition in section

---

[10] Flint Hills' Protest at 2-3.

4412(b)(2) since it was the first order issued by the Commission in this proceeding, and it imposed a quality bank adjustment by changing the valuation of the Heavy Distillate cut from the existing LS Diesel price minus 6.4302 cpg to the ULS Diesel price minus 10.4519 cpg, subject to refund. That processing cost adjustment has been in effect since that time. Thus, the September 26 Order accepting the replacement price for the Heavy Distillate cut, subject to refund, meets both of the statutory requirements of section 4412(b)(2).

18. The 15-month limit refers to the "first order of the[Commission] imposing quality bank adjustments in the proceeding." Thus, the section 4412(b)(2) preceding "15-month period" would be calculated from the September 26 Order, not the date of the order accepting any compliance filing. June 1, 2006, is clearly within that period, and thus satisfies the 15-month limit set forth in section 4412(b)(2).

19. The September 26 Order subjected the quality bank adjustment imposed and effectuated by that order to a hearing that potentially could result in a change to that adjustment. However, section 4412(b)(2) does not require the adjustment in the first order be final and not subject to change. On the contrary, by referring to "the earliest date of the first order," Congress clearly contemplated that the Commission might issue subsequent orders in the proceeding which could change the initially established quality bank adjustment. Flint Hills' position, that the term "imposing" in section 4412(b)(2) refers to the compliance filing in a proceeding, stands the language in that section on its head because the order accepting the compliance filing is the last order in that proceeding. Interpreting section 4412(b)(2) as Flint Hills proposes

improperly would read the word "first" out of the provision.

20. While section 4412(b)(2) limited the Commission's authority to order retroactive quality bank adjustments, it did not affect the refund authority conferred by section 15(7) of the Interstate Commerce Act (ICA). It is section 15(7) of the ICA that authorizes the Commission to impose retroactive adjustments back to the date set in the September 26 Order, not section 4412(b)(2). Section 4412(b)(2) merely limits the number of months preceding the September 26 Order that can be included in the refund period. Furthermore, while the first order in response to a pipeline filing is usually issued before 15 months would elapse, the ruling here does not mean that the 15-month limitation in section 4412(b)(2) can never come into play. For example, section 4412 (b)(2) would apply in the case of an "unlawful order," which apparently is the situation that motivated Congress to adopt the 15-month limitation as reflected in the material cited in Flint Hills' Protest at n.9.[11] It follows that Congress, in addition to taking remedial action affecting a pending case through section 4412(b)(1), would also include a

---

[11] That material shows that the concern addressed by section 4412 was a retroactive valuation as in Opinion No. 481, *supra* note 5. In that case, the Commission accepted certain quality bank valuations but the court reversed the Commission on certain valuations and remanded those valuations to the Commission for further action. The Commission then set those valuation issues for hearing. In 2004, the ALJ held that certain valuations should be retroactively changed back to 1993, with concomitant refunds back to that date. The Commission affirmed the retroactivity ruling but limited the retroactive period, and the resulting refunds, to February 1, 2000, in accordance with the Congressional limitation in section 4412 (b)(1).

provision, section 4412 (b)(2), designed to prevent a recurrence of the prospect of a lengthy refund period caused by extended litigation over an unlawful order.

The Commission orders:

The TAPS Carriers' April 2, 2008 compliance filing is accepted, effective June 1, 2006.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.